United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20381

355

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,
a corporation, *Appellant*

v.

AETNA CASUALTY & SURETY COMPANY,
a corporation, *Appellee*

Appeal from the United States District Court for the District of Columbia

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DOUGLAS A. CLARK
1012 Warner Building
Washington, D. C.
Attorney for Appellant

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

No. 20381

STATEMENT OF QUESTIONS PRESENTED

1. Were the letters between National Union Fire Insurance Company of Pittsburgh and its counsel at that time, E. Willard Hyde, Esquire, admissible in evidence when they had been delivered to counsel for Aetna Casualty & Surety Company by E. Willard Hyde, Esquire, without consulting or getting the consent of National Union Fire Insurance Company of Pittsburgh?

2. Would the granting of permission to E. Willard Hyde, Esquire, that he might defend Delbert J. Scott, and his defense of Scott, amount to a waiver or estoppel which would preclude National Union Fire Insurance Company of Pittsburgh from asserting the exclusionary clause in the policy which clearly puts Scott's injuries to Walker, his fellow employee, outside the coverage of the policy?

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CASES CITED

MISCELLANEOUS

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is based on Section 1291 of Title 28, United States Code since this is an appeal from the United States District Court for the District of Columbia.

STATEMENT OF FACTS

This appeal is before this Court asking this Court to reverse the judgment of the United States District Court for the District of Columbia, Judge Richmond B. Keech presiding, said judgment being entered on the 15th day of June, 1966, ordering that Aetna Casualty & Surety Company have judgment against National Union Fire Insurance Company of Pittsburgh in the amount of Thirty Thousand Forty-three and 00/100 Dollars ($30,043.00).

The original civil action which brought on this litigation was the result of an accident on March 4, 1958, in which a truck owned by the American Ice Company and an ambulance owned by W. W. Chambers Company were in collision in the District of Columbia. In the original action D. C. Transit Co. was also named as a defendant. The ambulance owned by W. W. Chambers Company was operated by one Delbert J. Scott, and one Harvey P. Walker was riding with Scott as an attendant or helper. Both Scott and Walker were injured as a result of this accident. Both Scott and Walker were employees of W. W. Chambers Company.

National Union Fire Insurance Company of Pittsburgh was the compensation carrier for W. W. Chambers Company and paid compensation and medical expenses to both Scott and Walker. Subsequent to these payments both Scott and Walker filed suits against American Ice Company and D. C. Transit Co. A verdict was directed in favor of D. C. Transit Co. and it is no longer involved in this situation.

In April of 1962 American Ice Company, by counsel, moved to file a Third-Party Complaint against Delbert J. Scott seeking contribution on the theory that he was jointly liable with the driver of the American Ice Company truck for the injuries sustained by Walker. The motion was granted. At the time this Third-Party Complaint was filed,

E. Willard Hyde, Esquire, was attorney for National Union Fire Insurance Company of Pittsburgh and for the plaintiff Walker and the plaintiff Scott. After the motion was granted permitting the filing of a Third-Party Complaint against Scott, prior to getting any approval from National Union Fire Insurance Company of Pittsburgh, Ernest C. Raskauskas, Esquire, an associate of Mr. Hyde, filed an Answer to the Third-Party Complaint on behalf of Delbert J. Scott. Twenty-four (24) days thereafter, without advising National Union Fire Insurance Company of Pittsburgh that an Answer had been filed, they sought permission to represent Mr. Scott in defense of the Third-Party Complaint as well as representing him as a plaintiff. Obviously at this point there was a conflict of interest between Scott and National Union Fire Insurance Company of Pittsburgh and Walker.

There was subsequent correspondence between National Union Fire Insurance Company of Pittsburgh and E. Willard Hyde, Esquire, relative to Mr. Hyde's representation of Scott, but nowhere was it ever indicated by National Union Fire Insurance Company of Pittsburgh that any coverage under the policy issued to W. W. Chambers Company also covered the negligence of Scott personally. As a matter of fact, the policy specifically excluded Scott as an insured in the following language:

> "The insurance with respect to any person or organization other than the named insured or such spouse does not apply:
>
> * * * * *
>
> "(2) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment . . ."

As a result of the above litigation Walker received a judgment against American Ice Company in the sum of Sixty Thousand Dollars ($60,000.00) and the Court entered

judgment against Delbert J. Scott on the Third-Party Complaint in the sum of Thirty Thousand Dollars ($30,000.00) plus Forty-three Dollars ($43.00) costs. That is the amount here involved.

Aetna Casualty & Surety Company was the insurance carrier for American Ice Company and subsequently paid to Walker and E. Willard Hyde, his attorney, the sum of Sixty Thousand Dollars ($60,000.00) plus costs. Aetna Casualty & Surety Company now claims to be the only party at interest in this suit.

There is no assignment of the judgment to Aetna Casualty & Surety Company or any other evidence except a praecipe stating that the judgment had been paid and satisfied.

Up to this point National Union Fire Insurance Company of Pittsburgh had never been named as a party plaintiff or defendant in this matter, and nowhere did it appear that National Union Fire Insurance Company of Pittsburgh had any interest therein.

Subsequent to the judgment above-mentioned and the payment thereof by Aetna Casualty & Surety Company, the file of E. Willard Hyde, Esquire, was turned over to counsel for Aetna Casualty & Surety Company without any authorization from National Union Fire Insurance Company of Pittsburgh for him to do so. As a result, the correspondence between National Union Fire Insurance Company of Pittsburgh and its counsel, E. Willard Hyde, was made available to counsel for Aetna Casualty & Surety Company, and this correspondence was admitted in evidence by the Court below, irrespective of the privilege existing between attorney and client.

It was from this correspondence, and this correspondence alone, that the Court below arrived at the conclusion that E. Willard Hyde was authorized to defend Scott in his capacity as third-party defendant, as well as representing Scott and Walker as plaintiffs, and as a result the Court

below arrived at the conclusion that National Union Fire Insurance Company of Pittsburgh precluded itself from asserting the exclusionary clause in the policy above stated, which clearly puts Scott's injuries to Walker, his fellow employee, outside the coverage of the policy.

After the payment of the judgment in the case of *Walker* v. *American Ice Company*, Aetna Casualty & Surety Company, the insurance carrier for American Ice Company, caused a garnishment to issue against National Union Fire Insurance Company of Pittsburgh in which the following questions were asked by interrogatories and the following answers given:

> "1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to third-party defendant? If so, how, and in what amount?
>
> "Answer: No.
>
> "2nd. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what?
>
> "Answer: No.
>
> "3rd. Had you at the time of the accident of March 4, 1958 an automobile liability policy issued to W. W. Chambers Co. covering the operation of the Cadillac ambulance involved in such accident? If so, state the number, date issued and policy limits.
>
> "Answer: Yes. Policy No. AC 750826 issued December 15, 1957. Our attorney advises us that we do not have to disclose policy limits.
>
> "4th. Did the policy referred to in Question 3 extend insurance coverage to employees of W. W. Chambers Co. operating automobiles belonging to said assured and operated in the course of its business and with its consent?

"Answer: Yes, but said policy does not cover an employee's negligence causing injury to fellow employee.

"5th. Pursuant to the provisions of the policy referred to in Questions 3 and 4, did you extend to third-party defendant Delbert J. Scott a defense to the claims asserted by the third-party complaint herein?

"Answer: We did not authorize a defense for Scott. We permitted counsel to defend Scott upon his representation that there was no conflict of interest involved.

"6th. If the answer to interrogatory No. 5 is in the affirmative, state whether such defense was extended under any form of reservation of rights, non-waiver agreement, or any other such disclaimer of liability.

"Answer: It was not, since we did not cover Scott for his negligence causing injury to a fellow employee.

* * * * *

"8th. Did you engage or retain counsel to represent third-party defendant Delbert J. Scott in the defense of said third-party complaint? If so, whom did you engage and when?

"Answer: We did not engage counsel. We permitted E. Willard Hyde, Esquire, to defend Scott upon his representation that there was no conflict of interest involved. Mr. Hyde was so advised in October of 1962.

"9th. Has counsel referred to in your answer to interrogatory No. 8 been paid by you for such legal services rendered in this cause? If not, why not?

"Answer: No. We are not indebted to him.

"10th. Are you obligated to satisfy the judgment entered on February 8, 1963 in this cause in favor of the third-party plaintiff American Ice Company against third-party defendant Delbert J. Scott for $30,000.00 and costs of $43.00?

"Answer: No.

"11th. If you contend that you are not obligated under your aforesaid policy to satisfy the judgment

entered on February 8, 1963 in this cause in favor of the third-party plaintiff American Ice Company against third-party defendant Delbert J. Scott, state each and every condition or exclusion in your aforesaid policy upon which you rely in support of your position.

"Answer:

"III. Definition of Insured: . . . The insurance with respect to any person or organization other than the named insured or such spouse does not apply:

"(1) . . .

"(2) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer."

To the above answers Aetna Casualty & Surety Company, in the name of American Ice Company, filed a Traverse as provided in the District of Columbia Code. (Sec. 16-317, District of Columbia Code, 1961 Ed.)

The trial held before the Honorable Richmond B. Keech in this case was the trial of the issues formed as a result of Aetna Casualty & Surety Company's traverse to the answers filed by National Union Fire Insurance Company of Pittsburgh in the attachment. After two days' discussion before the Honorable District Judge, it was then agreed that a Statement of Facts would be submitted, stipulated to by the parties, which is a part of this record. Along with this Agreed Statement of Facts the Court below ordered that the correspondence between E. Willard Hyde and National Union Fire Insurance Company of Pittsburgh be submitted. This was done. The Court below took this matter under advisement and on the 15th day of June, 1966, wrote a memorandum opinion and entered judgment against National Union Fire Insurance Company of Pittsburgh in the amount of Thirty Thousand Forty-three Dollars ($30,043.00).

STATUTES INVOLVED

Sec. 16-317, District of Columbia Code, 1961 Ed.

STATEMENT OF POINTS

(1) The lower Court erred in admitting into evidence the correspondence between National Union Fire Insurance Company of Pittsburgh and its attorney, E. Willard Hyde, Esquire, and likewise admitting into evidence the correspondence between E. Willard Hyde, Esquire, directed to National Union Fire Insurance Company of Pittsburgh.

(2) The defense of Scott, even if authorized by National Union Fire Insurance Company of Pittsburgh, would not be such an act on its part as to preclude it from relying upon the exclusionary clause of its policy which specifically excluded coverage to Scott under these circumstances.

(3) The Court below in actuality has required National Union Fire Insurance Company of Pittsburgh to assume a risk which its policy specifically excluded and a loss for which it received no premium.

SUMMARY OF ARGUMENT

(1) It is appellant's contention that the Court below was in error in admitting into evidence the correspondence between E. Willard Hyde, Esquire, and his client, National Union Fire Insurance Company of Pittsburgh, especially after they were delivered to the enemy, so to speak, by E. Willard Hyde, Esquire, National Union's former attorney.

(2) It is appellant's contention that the Court below actually wrote an insurance policy when none in fact existed.

(3) Appellant says that the defense, if furnished to Scott, cannot be taken advantage of by Aetna Cas-

uality & Surety Company because neither Aetna Casualty & Surety Company nor Scott were National Union's insured.

ARGUMENT

I.

Were the Letters Admissible in Evidence?

The Court below based the admissibility of the correspondence on the doctrine as set out in the following cases: *Willard C. Beach Air Brush Co.* v. *General Motors Corp.*, 118 F. Supp. 242; 97 C.J.S., Witnesses, § 287 (1957); and *Catalog Ass'n* v. *Eberly's Sons, Inc.*, 60 App. D.C. 216, 50 F. (2d) 981 (1931); and on the theory that the letters from National Union Fire Insurance Company of Pittsburgh to E. Willard Hyde, Esquire, were instructions given by National Union to its attorney to be acted upon by him and that the letters were not privileged, the Court stating: "By their very nature these instructions when carried out would become public."

The true facts are, nowhere in this law suit from the date of the happening of the accident in March of 1958 has National Union Fire Insurance Company of Pittsburgh ever appeared as a party until a garnishment was served upon it by American Ice Company in name, but in fact was served by Aetna Casualty & Surety Company. The instructions given by National Union and communications to its attorney would never have been divulged at any place except that after the trial occurred E. Willard Hyde, without the authority of National Union Fire Insurance Company of Pittsburgh, turned this material over to counsel for Aetna Casualty & Surety Company without National Union's consent, which is a direct breach of trust, and which he is forbidden to do, and Aetna Casualty & Surety Company should not be permitted to take advantage of his wrong.

It is not appellant's position that Aetna Casualty & Surety Company had any case against it at best, but certainly bereft of the communications between National Union and its attorney, Aetna Casualty & Surety Company would not have known that National Union Fire Insurance Company of Pittsburgh was even in this picture in any manner. Therefore, direct harm has been visited upon National Union Fire Insurance Company of Pittsburgh by the admission of this correspondence into evidence, without which Aetna Casualty & Surety Company would have had to fail in this case.

II.

Did the Court Below Write a Policy of Insurance When None in Fact Existed?

The Court below stated:

> "There is a well established doctrine that waiver and/or estoppel cannot be used to extend the coverage or the scope of the policy:
>
> "'* * * The rule is that while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage or restrictions on the coverage cannot be extended by the doctrine of waiver or estoppel. * * *
>
> "'* * * The doctrine of waiver cannot be invoked to create a primary liability * * *. * * *' *C. E. Carnes & Co.* v. *Employers' Liability Assur. Corp.*, 101 F. 2d 739, 742 (5th Cir., 1939).
>
> "See also *United Pac. Ins. Co.* v. *Northwestern Nat. Ins. Co.*, 185 F. 2d 443 (10th Cir., 1950); *Bourne* v. *Seal*, 53 Ill. App. 2d 155, 203 N.E. 2d 12 (App. Ct., 1964); 113 A.L.R. 857, 888 (1933). To this rule there is an equally well established exception, which is stated in its most accepted form in *American Jurisprudence:*
>
> "'* * * if a liability insurer, with knowledge of a ground of forfeiture or noncoverage under the policy, assumes and conducts the defense of an action brought against the insured, without disclaiming

> liability and giving notice of its reservation of rights, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or non-coverage. * * *' 29A Am. Jur., *Insurance* § 1465 (1960)."

The Court then proceeded to do just that.

A case squarely in point with the instant case is *Davis* v. *Travelers Insurance Company*, 295 F. (2d) 205 (U.S. Court of Appeals, 5th Cir. 1961). The facts were as follows: The plaintiff worked for Southdown Sugars, Inc. during the ten-week sugar grinding season in Louisiana and was employed in Southdown's sugar mill on Greenwood Plantation, near Thibodeux, Louisiana. He lived near Gibson, Louisiana, about 20 miles from Greenwood. The plaintiff, along with many of the seasonal workers, was transported to and from work in a company-owned truck, driven by a co-employee. At the time of the accident plaintiff Davis and some of the other employees were riding from their homes to Greenwood in a company truck driven by a Southdown employee, Bogan.

As a result of the accident, the insurer paid Davis workmen's compensation benefits and medical expenses. The plaintiff then brought a direct action against Southdown's insurers (it is permissible in Louisiana to name the insurance company as a party defendant either alone or with the insured) on the theory that Bogan was an omnibus insured under the standard Louisiana form of omnibus clause.

The policy involved in the case provided as follows (substantially the same language used in the insurance policy issued by National Union in the principal case): "The insurance with respect to any person or organization other than the named insured does not apply . . . (c) to any employee with respect to injury or to sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising

out of the maintenance or use of an automobile in the business of such employer . . ."

The Court in the *Davis* case held that: "The insurance policy unambiguously states that the omnibus clause does not extend insurance 'to any employee with respect to injury . . . of another employee of the same employer in the course of such employment'." The plaintiff was a co-employee with the driver (Bogan), therefore, and under the express language of the omnibus clause, Bogan is not an additional insured."

A careful reading of the pertinent clauses of the policy issued by National Union in the principal case leads to the conclusion that there is no liability when an employee of the named insured is injured while engaged in the employ of said insured.

In *Campbell* v. *Aetna Casualty & Surety Co.*, 211 F. (2d) 732 (4th Cir. 1954), Judge Soper stated: "The rule is well established that the doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom, and the application of the doctrines in this respect is therefore to be distinguished from the waiver of, or estoppel to assert, grounds of forfeiture. Thus, while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage, or restrictions on the coverage, cannot be extended by the doctrine of waiver or estoppel. While it is true that if the insurer, with knowledge of facts which would bar an existing primary liability, recognizes such primary liability by treating the policy as in force, he will not thereafter be allowed to plead such facts to avoid his primary liability, the doctrine of waiver cannot be invoked to create a primary liability and bring within the coverage of the policy risks not included or contemplated by its terms."

Waiver is the intentional surrender of a right. In insurance law, it is properly applied to breaches of policy conditions by the insured so as to deprive the insurer of a defense he might otherwise have. (5 *Cooley's Briefs on Insurance* (2d Ed.) 4534.) We respectfully submit that a contractual obligation so limited cannot be so increased by mere waiver. Inasmuch as the duty was not imposed on the insurer by the contract, "he cannot create such a new duty by a waiver without consideration." *Vance, Insurance*, 494. "While a forfeiture of benefits contracted for may be waived, the doctrine of waiver . . . cannot be successfully invoked to create a liability for benefits not contracted for at will." *McCoy* v. *Northwestern Mutual Relief Ass'n*, 92 Wis. 577, 66 N.W. 697.

Further, the Court in the case of *C. E. Carnes & Co.* v. *Employer's Liability Assur. Corp.*, 101 F. (2) 739 (5th Cir., 1939), stated that: "The rule is that while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage or restrictions on the coverage cannot be extended by the doctrine of waiver or estoppel."

The instant case does not involve the waiving of conditions which are required by the terms of the policy as a pre-requisite to the establishment of liability, such as prompt notice of the accident. It involves the construction of a contract of insurance which specifically limits the liability of the insurer. By means of the doctrine of waiver a contract may not be reformed so as to create a liability for conditions which are specifically excluded by the very terms of the instrument.

The exception to the general rule with regard to waiver and estoppel by the assumption of defense is set out in 29A Am. Jur. § 1465 as follows:

> "The general rule to the effect that the liability insurer, by assuming the defense of an action against the *insured*, is thereafter estopped from setting up the

> defense of noncoverage or from asserting against the *insured* some other defense existing at the time of the accident does not apply in those situations in which its assumption of the defense of the action against the *insured* is motivated by special factors which make it necessary or expedient for the insurer to assume the defense of the *insured*. Thus, if the insurer, in participating in the defense of an action against the *insured*, does so as a party defendant, so that the defense of the *insured* is essentially incidental to its own defense, the rule of estoppel does not apply." (Emphasis supplied.)

The Court below cites the case of *Ebert* v. *Balter*, 83 N.J. Super. 545, 200 A. 2d 532 (Union Cty. Ct., Law Div., 1964), in support of its opinion that National Union Fire Insurance Company of Pittsburgh was estopped to deny its liability under the policy. It overlooked the fact that the opinion in *Ebert* v. *Balter* was based upon the negligence of the insurer in failing to ascertain the correct date of the loss. There is no negligence, proven or alleged, in the instant case on the part of National Union Fire Insurance Company of Pittsburgh.

The rule of waiver and estoppel is spelled out in 1 ALR (3rd) 1139, at p. 1144, as follows: "While waiver and estoppel have been held applicable to nearly every area in which an insurer may deny liability, *the courts of most jurisdictions* agree that these concepts are not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or expressly excluded therefrom. The theory underlying this rule seems to be that the company should not be required by waiver and estoppel to pay a loss for which it charged no premium, and the principle has been announced in scores of cases involving almost every conceivable type of policy or coverage provision thereof." (Emphasis supplied.)

The above-stated rule is founded on the well-recognized principle that the Courts cannot create a new contract for the parties.

III.

Could Aetna Casualty & Surety Company Take Advantage of Waiver or Estoppel If Such Existed by the Defense of Scott, Since Neither Scott Nor Aetna Casualty & Surety Company Were National Union's Insureds?

It seems to appellant that the Court below entirely overlooked the guiding principle in all of the cases cited by appellant in its Memorandum of Law below and by appellee in its Memorandum of Law below, and by the opinion of the lower Court in its Memorandum. In every case cited the party who was pressing to invoke waiver or estoppel on his insurance carrier was an *insured* of the carrier.

Thorough search has been made and it is not believed that a case can be found wherein a Court held that the insurance company was estopped to deny coverage or that the insurance company had waived its right to deny coverage by its action unless the party from whom collection was being attempted was *an insured*, or the action was brought by the *insured* against the company.

In the instant case it might be a different situation were Scott attempting to force National Union Fire Insurance Company of Pittsburgh to pay the judgment which was rendered against him; but certainly a stranger to the transaction such as Aetna Casualty & Surety Company cannot take advantage of National Union's benevolent act to Scott. National Union Fire Insurance Company of Pittsburgh voluntarily, so the Court below found, rendered a defense for Scott although he was specifically excluded as an insured under the policy. Appellant fails to see that if National Union gratuitously furnished an attorney to Scott, that in any way could be construed as a waiver or estoppel for them to deny coverage. Have we reached the point in business dealings where we are afraid to lend a hand to a fellow human in trouble for fear that his troubles might be loaded upon our shoulders? Then business has come to a rare state, indeed, and especially

when the person complaining is not the person who was befriended.

This position is supported by the following cases: *Brown* v. *Kennedy*, 141 Ohio 457, 48 N.E. (2d) 857 (1943), in which the Court stated: "The defense of an uninsured person is not sufficient of itself to constitute an estoppel."

Similarly, in *National Farmers Union Property & Casualty Co.* v. *Michaelson*, 110 N.W. (2d) 431 (N.D. 1961), the Court held that where a deceased applicant had no coverage at the time of the accident, the insurer by undertaking to assist in the defense of such uninsured person or her estate, did not by such action create a policy enabling judgment creditors of applicant's estate to recover from the insurer.

In *Reisman* v. *New Hampshire Fire Insurance Company*, 312 F. (2d) 17 (1963), the Court said: "Conditions going to the coverage or scope of a policy of insurance, as distinguished from those furnishing a ground for forfeiture, may not be waived by implication from conduct or action."

CONCLUSION

It is respectfully submitted that the Court below wrote a policy of insurance between National Union Fire Insurance Company of Pittsburgh and Delbert J. Scott, for which no premium had ever been paid and never will be paid, and imposed liability upon National Union Fire Insurance Company of Pittsburgh because of a charitable act of defense on its part, and such judgment of the lower Court is wrong and ought to be set aside and judgment entered for National Union Fire Insurance Company of Pittsburgh.

Respectfully submitted,

DOUGLAS A. CLARK
1012 Warner Building
Washington, D. C.
Attorney for Appellant

APPENDIX

INDEX TO JOINT APPENDIX

JOINT APPENDIX

[Filed July 30, 1959]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2071-59

HARVEY P. WALKER
9611 Belair Road, Baltimore, Maryland

and

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH
(a corporation)
1319 F St., N.W., Washington, D. C.

Plaintiffs

v.

AMERICAN ICE COMPANY, INC. (a corporation)
1515 F St., N.E., Washington, D. C.

and

D. C. TRANSIT SYSTEM, INC. (a corporation)
36th & M Sts., N.W., Washington, D. C.

Defendants

Complaint

(Negligence—Traffic Accident)

1. The amount in controversy is in excess of Three Thousand Dollars ($3,000.00), and therefore the matter is in the jurisdiction of this Court.

2. Plaintiff in the scope of his employment with W. W. Chambers Company, Inc. (a corporation), was a passenger in an ambulance owned by the said W. W. Chambers Company, Inc., and being operated in a lawful and prudent

manner west on Pennsylvania Ave., S.E. in the District of Columbia. At the same time, a truck of the defendant, American Ice Company, operated in the scope of employment by an employee of said defendant, in a careless and negligent manner and in violation of the motor vehicle traffic regulations then and there in force and effect, in a northerly direction on North Carolina Ave., S.E. in the District of Columbia, at the intersection of said Pennsylvania Ave., S.E. and said North Carolina Ave., S.E., did strike the vehicle in which plaintiff Harvey P. Walker was a passenger, with great force and violence, causing grievous personal injuries to the said plaintiff.

3. A contributory cause of the accident was the negligence of an employee of the D. C. Transit System, Inc., in operating a vehicle of said defendant in the scope of his employment in a careless and negligent manner and in violation of the traffic regulations then and there in effect, so as to block the view of vehicles approaching the said intersection.

4. As a result of said accident, plaintiff, Harvey P. Walker sustained multiple, serious personal injuries, including but not limited to severe injuries to the cervical, dorsal and lumbar portions of the spine, cerebral concussion, multiple lacerated wounds of the forehead, scalp and lip and fracture of the left cheek bone and left lower jaw. These injuries resulted in disfiguring scars to the face of said plaintiff, continuous severe headaches, pains in the neck and back and disturbances of vision. As a further result of said accident, said plaintiff was hospitalized for Fourteen (14) days immediately following the accident and again for an additional period of five and a half weeks, commencing on or about May 1, 1958. Said plaintiff was totally disabled and unable to work from the time of the accident until April 1, 1959, and continues to have a severe, partial disability, which is expected to be permanent in nature. In addition, said plaintiff suffered

substantial loss of employment and income, has had and continues to have grievous pain and suffering and expects to continue to suffer for the remainder of his life.

5. As a result of a policy of workmen's compensation insurance carried by plaintiff Harvey P. Walker's employer, W. W. Chambers Company, Inc., plaintiff National Union Fire Insurance Company of Pittsburgh was required to and did make payments toward the hospitalization and medical expenses of the plaintiff, Harvey P. Walker and has paid and is continuing to pay workmen's compensation to the said Harvey P. Walker. At the present time the total amount so paid by the National Union Fire Insurance Company of Pittsburgh is Four Thousand Six Hundred Seventy-four Dollars and Fifty-five Cents ($4,674.55).

WHEREFORE, plaintiffs demand the sum of One Hundred Seventy-five Thousand Dollars ($175,000.00).

/s/ E. WILLARD HYDE
E. Willard Hyde

[Filed September 4, 1959]

Answer of Defendant, American Ice Company, Inc., to Complaint, and Crossclaim of Defendant, American Ice Company, Inc., Against Defendant, D. C. Transit Company, Inc., a Corporation

FIRST DEFENSE

The Complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

Defendant, American Ice Co., Inc., avers that the accident occurred on March 4, 1958; admits the occurrence of the accident and that plaintiff, Harvey P. Walker, within the scope of his employment was a passenger in the ambulance,

and that the truck of this defendant was being operated by its employee within the scope of his employment as alleged in paragraph 2, but denies all of the remaining allegations of paragraph 2, and specifically denies that the collision and alleged results were caused by the operation of its vehicle in a careless and negligent manner and in violation of the traffic and motor vehicle regulations; avers it is without knowledge or information to form a belief as to the truth of the allegations in paragraphs 4 and 5; and denies each and every other allegation of the complaint pertaining to it which have not hereinbefore been specifically answered.

Third Defense

This defendant avers that the accident and alleged results were caused by the carelessness, negligence and violation of applicable traffic and motor vehicle regulations by W. W. Chambers and/or its driver employee, Delbert J. Scott while acting within the scope of his employment and/or the carelessness, negligence and violations by plaintiff, Harvey P. Walker, as a party to a joint venture with W. W. Chambers and/or Delbert J. Scott.

Fourth Defense

This defendant avers that the accident and alleged results were caused by the carelessness, negligence and violation of applicable traffic and motor vehicle regulations by the defendant D. C. Transit Co., Inc., in the operation of its vehicle by its employee within the scope of his employment.

Fifth Defense

This defendant avers that plaintiff, Harvey P. Walker, failed and neglected to exercise due care for his own safety at the time and under the circumstances alleged in the complaint, and that such failure and negligence caused or

contributed to cause the alleged accident and results complained of.

SIXTH DEFENSE

This defendant avers that, under the facts and circumstances alleged in the Complaint, plaintiff Walker assumed the risk incident to his employment.

CROSSCLAIM OF AMERICAN ICE CO., INC., AGAINST DEFENDANT, D. C. TRANSIT, INC., A CORPORATION

Defendant, American Ice Co., Inc., avers that at the time and place and under the circumstances alleged in the Complaint an agent-operator of defendant, D. C. Transit Co., Inc., while acting within the scope of his employment, negligently, carelessly, and in violation of the traffic and motor vehicle regulations for the District of Columbia operated and stopped one of its streetcars in a pedestrian crosswalk, thus obscuring the view of the driver of the defendant's, American Ice Co., vehicle, and that such negligence, carelessness and violations aforesaid caused or contributed to the happening of the accident, and all alleged results, injuries, expenses, losses and damages, and that if plaintiffs may be awarded a judgment against defendant, American Ice Company, it claims indemnity and/or contribution from D. C. Transit Co., for all or a contributable portion of any judgment rendered against it in favor of the plaintiffs herein.

WHEREFORE, defendant, American Ice Co., demands judgment against defendant, D. C. Transit Co., for all or a proper contributable portion of any judgment entered herein in favor of Plaintiffs against this defendant.

PLEDGER & EDGERTON

By: /s/ JUSTIN L. EDGERTON
Justin L. Edgerton

[Filed April 16, 1962]

Motion of Defendant American Ice Company, Inc. To Bring in Third-Party Defendant

Defendant American Ice Company, Inc. moves the Court for leave to make Delbert J. Scott, 949 Ohio Street, Detroit, Michigan, a party to this action and that there be served upon him a summons and third-party complaint as set forth in the attached Exhibit.

PLEDGER & EDGERTON

By: /s/ JUSTIN L. EDGERTON
Justin L. Edgerton

[Filed May 7, 1962]

Third-Party Complaint

1. The plaintiffs have filed a complaint against defendant American Ice Company, Inc., a copy of which is hereto attached and marked "Exhibit A".

2. The defendant and third-party plaintiff American Ice Company, Inc. alleges that the collision described in the complaint and the injuries, damages and expenses therein complained of to the plaintiff Harvey P. Walker and the damages and expenses thereof complained of to the plaintiff National Union Fire Insurance Company of Pittsburgh were proximately caused by the negligence and carelessness of the third-party defendant Delbert J. Scott in the manner in which he was operating the motor ambulance in which said plaintiff Harvey P. Walker was riding.

WHEREFORE, defendant and third-party plaintiff American Ice Company, Inc. demands judgment against third-party defendant Delbert J. Scott for all or a contributable portion of any judgment that may be recovered by the

plaintiffs against defendant third-party plaintiff American Ice Company, Inc.

PLEDGER & EDGERTON

By: /s/ JUSTIN L. EDGERTON
Justin L. Edgerton

* * * * * * * * * *

[Filed Sept. 8, 1962]

Answer of Third-Party Defendant

FIRST DEFENSE

The Third-Party Complaint fails to state a claim against the Third-Party Defendant upon which relief can be granted.

SECOND DEFENSE

The Third-Party Defendant denies all allegations of negligence as contained in the Third-Party Complaint.

THIRD DEFENSE

For further answer to the Third-Party Complaint, Third-Party Defendant alleges that the collision described in Plaintiff's Complaint was caused or contributed to by the sole and/or concurrent negligence of defendants American Ice Company, Inc. and D.C. Transit System, Inc.

FOURTH DEFENSE

By way of affirmative defense, Third-Party Defendant alleges that the claim of the Third Party Plaintiff is barred by the statute of limitations, the collision described in the Plaintiff's Complaint having occurred more than three years next preceeding the filing of this Third-Party Complaint.

/s/ ERNEST C. RASKAUSKAS
Ernest C. Raskaukas

* * * * * * * * * *

[Filed Nov. 14, 1962]

Verdict and Judgment

THIS CAUSE having come on for hearing on the 6th day of November, 1962, before the Court and a jury of good and lawful persons of this Court, to wit:

Holmes M. Johnson	Louis A. Edelman
Robert J. Anzleman	Mrs. Ruth K. Gardner
Mrs. Elizabeth M. Steele	John A. Goldsby
Mrs. Daisy B. Rivers	Alonzo J. Collins
Mrs. Martha P. Hill	Macon A. Williams
Mrs. Elizabeth M. Duvall	Lawrence C. Butler

who, after having been duly sworn to well and truly try the issues between Harvey P. Walker and National Union Fire Insurance Company of Pittsburgh, plaintiffs, and American Ice Co., a corp., defendant, and 3rd party plaintiff, D. C. Transit Co., a corp., defendant, against Delbert J. Scott, 3rd party defendant, and after this cause is heard and given to the jury in charge that upon their oath say this 9th day of November, 1962, that they find for the defendant, D. C. Transit Co., and against said plaintiffs by direction of the Court.

WHEREFORE, it is adjudged that said plaintiffs take nothing by this action; that said defendant, D. C. Transit Co., Inc., go hence and recover of plaintiffs its costs of defense.

/s/ JOHN A. GOLDSBY

* * * * * * * * * *

[Filed Feb. 8, 1963]

Judgment in Favor of Third-Party Plaintiff American Ice Co. Against Third-Party Defendant Delbert J. Scott

It appearing to the Court that the judgment in favor of the plaintiffs Harvey P. Walker and National Union Fire Insurance Company of Pittsburgh vs. defendant American

Ice Company in the principal amount of $60,000.00, together with taxable costs of $86.00, has been entered as fully paid and satisfied, and that judgment for contribution has been entered herein upon the verdict of the jury of November 14, 1962, in favor of the Third-Party Plaintiff American Ice Company against the Third-Party Defendant Delbert J. Scott, it is, by the Court, this 8th day of February, 1963,

ADJUDGED and ORDERED, that judgment be, and it is hereby entered in favor of the Third-Party Plaintiff American Ice Company against the Third-Party Defendant Delbert J. Scott in the sum of $30,000.00, together with costs of $43.00 and that it have execution therefor.

/s/ DAVID A. PINE
Judge

* * * * * * * * * *

[Filed March 23, 1966]

Praecipe Indicating Aetna Casualty & Surety Company as the Party in Interest Instead of American Ice Company, et al.

The Clerk of said Court will please add Aetna Casualty & Surety Company as a party to the traverse proceedings herein as a judgment creditor.

/s/ JUSTIN L. EDGERTON
Justin L. Edgerton

[Filed June 15, 1966]

Agreed Statement of Facts

The automobile accident which gave rise to this litigation occurred on March 4, 1958, at the intersection of North Carolina Avenue and Pennsylvania Avenue, S. E., between a truck owned and operated by American Ice Company and an ambulance owned by W. W. Chambers Company and operated by Delbert J. Scott in which Harvey P. Walker

was riding as an attendant, both Scott and Walker being employees of W. W. Chambers Company. As a result of the collision, both Scott and Walker were injured.

Thereafter, two suits were filed by E. Willard Hyde, Esquire, as attorney for the plaintiffs, one by Harvey P. Walker and National Union Fire Insurance Company of Pittsburgh, which was subrogated to a part of the claim by reason of workmen's compensation and medical payments made to and for the benefit of Walker, as plaintiffs, against American Ice Company and D. C. Transit, Inc., and the other by Delbert J. Scott, in which the workmen's compensation insurance carrier was also joined as plaintiff, against the same defendants.

During the pendency of these suits, Ernest C. Raskauskas also entered his appearance as attorney for the plaintiffs.

The suits were consolidated for pretrial and trial.

On April 16, 1962, in the Walker case, American Ice Company moved for leave to file a third-party complaint against Delbert J. Scott seeking contribution on the theory that he was jointly liable with the driver of the American Ice Company truck for the injuries sustained by Walker. The motion was granted by Judge Tamm over objection by Mr. Raskauskas for the plaintiffs. Service of third-party summons against Scott was effected as a non-resident of the District of Columbia under the provisions of Title 40, sec. 423, D.C. Code, and on September 6, 1962, an answer to the third-party complaint was filed in behalf of the third-party defendant Scott by Messrs. Hyde and Raskauskas, as his attorneys.

On September 19, 1962, a supplemental pretrial hearing was held concerning the issues raised by the third-party complaint and the answer thereto in which Mr. Raskauskas participated as attorney for the third-party defendant Scott.

The consolidated cases were called for trial in this Court before Judge Pine on November 6, 1962, and on November 14 trial was concluded. Both Mr. Hyde and Mr. Raskauskas actively defended Scott as third-party defendant in this trial, as well as trying both cases for the plaintiffs. This defense was extended to Scott without any form of reservation of rights, non-waiver agreement or other disclaimer of liability by National Union Fire Insurance Company (Interrogatory 6 and answer thereto, *ante*.) The verdict of the jury in the Walker case was for the plaintiffs for $60,000.00 and on the third-party complaint for the third-party plaintiff, American Ice Company, for contribution against third-party defendant Scott. In the Scott case, the verdict of the jury was for the defendant American Ice Company (a motion for directed verdict was granted in behalf of defendant D. C. Transit Company at the conclusion of the plaintiff's cases.) Post-trial motion in the Walker case for new trial was made and denied, and on January 31, 1963, a praecipe was filed in the Walker case, entering the judgment for plaintiffs Walker and National Union Fire Insurance Company against American Ice Company as fully paid and satisfied.

On February 8, 1963, a judgment was entered by Judge Pine on the verdict in favor of third-party plaintiff American Ice Company against third-party defendant Delbert J. Scott for $30,000.00 and costs of $43.00.

On the date of the accident, March 4, 1958, the Cadillac ambulance owned by W. W. Chambers Company was insured for public liability by Policy No. AC750826, issued by National Union Fire Insurance Company of Pittsburgh on December 15, 1957, a specimen copy of this policy is stipulated. The "Insuring Agreements" of this policy contain the following provision:

> "III. Definition of Insured: (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' in-

cludes the named insured and, if the named insured is an individual, his spouse if a resident of the same household, and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either. The insurance with respect to any person or organization other than the named insured or such spouse does not apply:

* * * * * *

"(2) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer."

National Union Fire Insurance Company refused to pay the judgment against Scott, and on March 8, 1963, the instant attachment was issued by third-party plaintiff American Ice Company against National Union Fire Insurance Company of Pittsburgh as garnishee. The garnishee thereafter made the following answers to the interrogatories on this attachment:

"1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to third-party defendant? If so, how, and in what amount?

"Answer: No.

"2nd. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or

credits of the defendant in your possession or charge? If so, what?

"Answer: No.

"3rd. Had you at the time of the accident of March 4, 1958 an automobile liability policy issued to W. W. Chambers Co. covering the operation of the Cadillac ambulance involved in such accident? If so, state the number, date issued and policy limits.

"Answer: Yes. Policy No. AC 750826 issued December 15, 1957. Our attorney advises us that we do not have to disclose policy limits.

"4th. Did the policy referred to in Question 3 extend insurance coverage to employees of W. W. Chambers Co. operating automobiles belonging to said assured and operated in the course of its business and with its consent?

"Answer: Yes, but said policy does not cover an employee's negligence causing injury to fellow employee.

"5th. Pursuant to the provisions of the policy referred to in Questions 3 and 4, did you extend to third-party defendant Delbert J. Scott a defense to the claims asserted by the third-party complaint herein?

"Answer: We did not authorize a defense for Scott. We permitted counsel to defend Scott upon his representation that there was no conflict of interest involved.

"6th. If the answer to Interrogatory No. 5 is in the affirmative, state whether such defense was extended under any form of reservation of rights, non-waiver agreement, or any other such disclaimer of liability.

"Answer: It was not, since we did not cover Scott for his negligence causing injury to a fellow employee.

* * * * * *

"8th. Did you engage or retain counsel to represent third-party defendant Delbert J. Scott in the defense of said third-party complaint? If so, whom did you engage and when?

"Answer: We did not engage counsel. We permitted E. Willard Hyde, Esquire, to defend Scott upon his representation that there was no conflict of interest involved. Mr. Hyde was so advised in October of 1962.

"9th. Has counsel referred to in your answer to Interrogatory No. 8 been paid by you for such legal services rendered in this cause? If not, why not?

"Answer: No. We are not indebted to him.

"10th. Are you obligated to satisfy the judgment entered on February 8, 1963 in this cause in favor of the third-party plaintiff American Ice Company against third-party defendant Delbert J. Scott for $30,000.00 and costs of $43.00?

"Answer: No.

"11th. If you contend that you are not obligated under your aforesaid policy to satisfy the judgment entered on February 8, 1963 in this cause in favor of the third-party plaintiff American Ice Company against third-party defendant Delbert J. Scott, state each and every condition or exclusion in your aforesaid policy upon which you rely in support of your position.

"Answer:

"III. Definition of Insured: . . . The insurance with respect to any person or organization other than the named insured or such spouse does not apply:

"(1) . . .

"(2) to any employee with respect to injury to or sickness, disease or death of another employee

of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer."

On April 11, 1963, third-party plaintiff American Ice Company filed a traverse to these answers.

At a hearing before Judge Keech on March 23, 1966, Aetna Casualty and Surety Company was made a party to these attachment proceedings by praecipe filed on that date. In fact, Aetna Casualty and Surety Company is the only party who has any interest in the attachment proceedings before this Court.

There are attached hereto copies of correspondence between National Union Fire Insurance Company of Pittsburgh and E. Willard Hyde, Esquire, counsel having selected those letters which they deemed to be material and relevant to the issues raised herein. The attorney for National Union Fire Insurance Company does not admit that these letters are relevant or material or that they are admissible in evidence. They are attached hereto but specific objection is reserved to their admissibilty.

JUSTIN L. EDGERTON,
Attorney for American Ice Company and Aetna Casualty & Surety Company

DOUGLAS A. CLARK,
Attorney for National Union Fire Insurance Company of Pittsburgh

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N.W.
WASHINGTON 4, D. C.

October 1, 1962

Mr. Cosmos Reale
National Union Fire Insurance Co.
Pittsburgh, Penna.

Re: Scott and Walker vs. American Ice Company and D.C. Transit System
Claim No. 1-c-2787
Date of Accident: March 4, 1958

Dear Mr. Reale:

This is to advise you that the above styled case has been especially set for trial on November 6, 1962 at 10:00 a.m. because the plaintiffs are out of town residents.

You have been informed in ours of May 9, 1962, to which I did not have the courtesy of a reply, that Scott was brought in as a co-defendant and a motion was granted by the presiding judge that in the event there is a finding in this case for the plaintiffs Scott as the third party defendant should share part of the losses, which would ordinarily entitle him to an attorney furnished by the assured's insurance carrier, if there was a conflict of interest.

After giving this case much thought, we are of the opinion that there is no conflict of interest in this case as Walker's and Scott's testimony will be the same and, therefore, there is no need to obtain further counsel as we can represent Scott as the plaintiff as well as the defendant when the facts are analogous. I think after you give this matter your thoughts that you will agree with the writer that further counsel would tend to confuse the jury in the issues of this case.

We are moving forward on November 6, 1962 to recover for the injuries to Scott and Walker as well as the amount that you have outlaid in the compensation case.

As you will know, we have taken the deposition of Walker and now the deposition of Scott has been taken for which there is a bill enclosed for $31.50. A draft has gone forward to the court reporter for the cost of this deposition which was ordered by the defendant.

I do not anticipate any trouble in having Scott and Walker here for the trial as we are writing to them at the present time alerting them that the case has been especially set for the above date. Of course, we will send subpoenas to all the witnesses for the trial date.

During the interim, if you have any questions in mind, please advise us and we will keep you alerted as to the happenings of this case.

Very truly yours,

E. Willard Hyde
E. Willard Hyde

EWH:lac
Encls.: Bill for deposition
Copies of draft to court reporter
Two drafts issued at the last trial date which were not negotiated

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N.W.
WASHINGTON 4, D. C.

October 1, 1962

Mr. Cosmos Reale
National Union Fire Insurance Co.
Pittsburgh, Penna.

Re: Scott and Walker vs. American Ice Company and D.C. Transit System
Claim No. 1-c-2787
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Very truly yours,

E. Willard Hyde
E. Willard Hyde

EWH:lac
Encls.: Bill for deposition
Copies of draft to court reporter
Two drafts issued at the last trial date which were not negotiated

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N.W.
WASHINGTON 4, D. C.

October 12, 1962

Mr. Cosmos Reale
National Union Fire Insurance Co.
Pittsburgh 13, Penna.

Re: Scott and Walker vs. American Ice Company and D. C. Transit System
Claim No. 1-C-2787
Date of Accident: March 4, 1958

Dear Mr. Reale:

Since writing to you on October 1, 1962, I have heard from Harvey Walker. However, I have not had a reply from Delbert J. Scott which gives me some concern. No doubt he received my letter or it would have been returned marked "moved left no address", "unclaimed", or "unknown". I am writing to Scott again by registered mail so that he will be sure to receive the letter and be alerted to the special setting of the case for November 6, 1962 at 10:00 a.m. in the District Court for the District of Columbia.

In paragraph three of our letter to you on the above date, I asked whether or not you concurred that we represent Scott as the plaintiff as well as the defendant and I have had no sanction of our procedure in this respect. It is my suggestion that we defend Scott both as the plaintiff and as the defendant as the facts are analogous. However, I should have a letter from you or someone in the company who has the authority to the effect that we are to defend Scott as the plaintiff and as the defendant in this case in order that our interest be protected. We do not want to be placed in a position where Scott would have

to share a judgment which would be over and against the carrier for W. W. Chambers Company without the consent of the company that we represent Scott.

I feel sure that there will be a sizeable judgment for Walker as he was a passenger but since Scott was the driver he could be found guilty in this case by the jury as contributing to the accident.

Will you please advise me by return post as to whether or not our defending Scott as the plaintiff as well as the defendant meets with your approval immediately.

Very truly yours,

E. WILLARD HYDE
E. Willard Hyde

EWH:lac

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N.W.
WASHINGTON 4, D. C.

October 17, 1962

Mr. Cosmos Reale
National Union Fire Insurance Co.
Pittsburgh 13, Penna.

Re: Scott and Walker vs. American Ice Co., Inc. and D. C. Transit System
Claim No. 1-C-2787
D/A: March 4, 1958

Dear Mr. Reale:

I wrote to you on the date of October 12, 1962 and this letter requested an answer from you by return post as to whether or not we could act as Scott's attorney plaintiff and defendant wise as the facts are analogous in the case

with that of Walker. To date, I have not had the courtesy of a reply. Please let me hear from you immediately upon receipt of this letter as we must prepare the case further for trial. In other words, we want to be ready and sure we are ready on November 6, 1962 at 10:00 a.m.

I have heard from Scott following our registered letter to him by long distance telephone and he will be here on November 5, 1962 which will give us a day to go over the case with Scott and Walker for the 6th of November, 1962. We have already been over the facts several times with Walker and Scott but we want to be assured of our action so we will have to make a repeat of this with the plaintiffs and defendant.

Very truly yours,

E. WILLARD HYDE
E. Willard Hyde

EWH:lac

NATIONAL UNION INSURANCE COMPANIES
PITTSBURGH 13, PENNSYLVANIA

October 24, 1962

E. Willard Hyde, Esq.
1319 F Street, N.W.
Washington 4, D. C.

Re: Claim No. 1-C-2787
Scott and Walker vs.
American Ice Company and
D. C. Transit System
D/A: March 4, 1958

Dear Mr. Hyde:

In response to your previous correspondence, and specifically your correspondence of October 12, 1962, I have discussed this matter with the Eastern Zone Claim Manager, Mr. Cosmos Reale.

It has been agreed you may render a defense to Scott in the present pending matter of Scott and Walker vs. American Ice Company and D. C. Transit System.

This Company afforded liability coverage to the W. W. Chambers Company, Inc. under Policy No. AC 750826.

We request any correspondence regarding the liability portion be directed to Home Office under above mentioned liability policy number and any additional fee incurred as a result of defending under the liability exposure should be submitted to the Company separate from the compensation arrangements.

We are creating a liability file and will appreciate your advice as to the current status, anticipated exposure, and completion of the attached attorney's suit report which our Company requires in all liability cases.

I apologize for the delay in this matter and thank you for your very fine cooperation.

Very truly yours,

LLOYD G. AMBERSON
Lloyd G. Amberson
Workmen's Compensation Supervisor

LGA: mlc
Enclosure

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N. W.
WASHINGTON 4, D. C.

October 25, 1962

Mr. Lloyd G. Amberson
National Union Fire Insurance Co.
Pittsburgh 13, Penna.

Re: Claim No. 1-C-2787
Delbert Scott and Harvey Walker vs. American Ice Co., Inc. and D. C. Transit System, Inc.
Policy No. AC 750826
D/A: March 4, 1958

Dear Mr. Amberson:

I have and thank you for yours of October 24, 1962 and I am enclosing the Attorney's 30 Day Suit Report.

In summary, on March 4, 1958 Delbert Scott, driver of the ambulance of W. W. Chambers Co., and Harvey Walker, his assistant, received an emergency call to go to the residence of the now deceased and take him to the Mt. Alto Hospital. On obtaining the patient, Walker attached the oxygen mask as his breath was short and the ambulance thence started up going west on Pennsylvania Avenue. Scott was driving at about twenty or twenty-five miles per hour and Walker was in the rear compartment of the ambulance looking out the window of said ambulance with the lights and siren going full blast at the intersection. Cars moved over and stopped to let the ambulance by when the driver of the American Ice Company, Inc.'s truck came through the intersection on a green light and struck said ambulance in the middle a severe blow which caused the death of the patient and serious bodily injuries to Scott. It is our belief that Walker, who was a passenger and employee at the time that the ambulance was struck, received mental injury as well as serious bodily injuries.

Your files will reflect that we have paid compensation to Scott and Walker under the assured's compensation policy and we are now making a claim for our subrogation rights against the defendants. Scott was brought in as a co-defendant in this action by the defendant American Ice Company, Inc.'s counsel.

The deceased passenger's case was settled by a contribution with the American Ice Company, Inc.

Scott was found guilty at the coroner's inquest and the writer defended him for negligence homicide in the Federal Court. The jury, after seven days, rendered a verdict in his favor.

This case came up for trial during the May term of court but due to Dr. Braden's absence the case was continued and especially set for November 6, 1962 at 10:00 a.m. due to out-of-town witnesses (Scott and Walker). We will go about getting the subpoenas out to all the witnesses in this case in the near future.

We will keep you advised of our procedure in the subrogation case as well as the liability case wherein Scott is named as a third party defendant.

Very truly yours,

E. Willard Hyde
E. Willard Hyde

EWH: lac
Enc.

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N. W.
WASHINGTON 4, D. C.

November 6, 1962

Mr. Lloyd Amberson
National Union Fire Insurance Co.
Pittsburgh 13, Penna.

Re: Claim No. 1-C-2787
Policy No. AC 750826
Scott & Walker vs. American Ice Company, Inc. and D. C. Transit System
D/A: March 4, 1958

Dear Mr. Amberson:

I wish to advise you that the defendants in the above styled case finally decided that they did not want to pay the $18,000.00 to get the case behind us for the plaintiffs and the defendant, Scott. We are going forward with the trial of this case and had Scott on the witness stand for the entire day. Suprisingly, he made a much better witness than the writer anticipated.

We will no doubt put Walker on the stand tomorrow which will probably take most of the day. We also anticipate putting Joseph Tredway and Ralph King on the stand if possible.

It may be that this is a God-send that we did not take the $18,000.00 preferably so if Walker makes as good a

witness as Scott. We will keep our fingers crossed and hope for the best results from the jury.

With kindest personal regards, I am

Very truly yours,

E. WILLARD HYDE
E. Willard Hyde

EWH: lac

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N. W.
WASHINGTON 4, D. C.

November 6, 1962

Mr. Lloyd G. Amberson
National Union Fire Insurance Co.
Pittsburgh 13, Penna.

Re: Claim No. 1-C-2787
Policy No. AC 750826
Scott & Walker vs. Amerisan Ice Co., Inc. and D. C. Transit System
D/A: March 4, 1958

Dear Mr. Amberson:

As you have been previously advised the above styled case is especially set for trial on November 6, 1962 at 10:00

a.m. We have issued subpoenas to the following and the draft copies covering the same are enclosed.

Officer Nelson R. Marsh	$4.50
Officer W. B. Phares	4.50
Robert V. Murray, Chief of Police	4.50
Medical Records Librarian, Washington Hospital	4.50
Medical Records Librarian, Casualty Hospital	4.50
Robert Davis	4.50
Joseph Tredway	4.50
Ralph King	4.50
U.S. Marshal (This check for $12.00 is void due to the fact that the charge for serving the subpoenas is 50¢ each rather than $1.00 each as my associate, E. Raskauskas, was previously advised.)	
Ernest C. Raskauskas (This draft covers his advance to the U.S. Marshal for the correct amount of serving the subpoenas of $6.00 and also the witness fees of the four doctors, Dr. Braden, Dr. Maloy, Dr. Yager, and Dr. Johnson, at $4.50 each which was required by the U.S. Marshal before service of the subpoenas.)	24.00
Total	$60.00

In order to get Delbert J. Scott to Washington, D. C. for the trial of this case we had to advance the amount of a round-trip air plane ticket, which was $54.67, and we allowed him $20.00 for spending money or a total of $74.67. Copies of this draft are enclosed along with a copy of our letter to Mr. Scott which is self-explanatory.

We are confident in our case of Walker but we have an up-hill battle with Scott, who was the driver of the am-

bulance. We will keep you advised of our further procedure.

Very truly yours,

E. WILLARD HYDE
E. Willard Hyde

EWH: lac
Encls.

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N. W.
WASHINGTON 4, D. C.

November 9, 1962

Mr. Lloyd Amberson
National Union Fire Insurance Co.
Pittsburgh 13, Penna.

Re: Claim No. 1-C-2787
Policy No. AC 750826
Scott & Walker vs. American Ice Co., Inc. and D.C. Transit System, Inc.
D/A: March 4, 1958

Dear Mr. Amberson:

I am enclosing to you copies of our draft to Delbert J. Scott for $53.44 which takes care of his hotel bill through Tuesday next at $4.68, which the enclosed bills evidence, per day or a total of $37.44. Also included in this draft is food expense for four days at $4.00 per day or $16.00.

We have already advanced the round-trip plane fare of $54.67 and the taxicab fare which included fare from Detroit to the airport of $10.11 and Washington, D.C. cab fare of $2.30, or the draft was in the sum of $74.67.

The above styled case was completed as far as the plaintiffs and defendants were concerned on Friday, November 9, 1962 at 4:00 p.m. Due to the holiday on Monday the case will be resumed on Tuesday with the argument to the jury as far as the plaintiffs and defendants are concerned and Judge Pine's instructions as to the law.

The defendant D.C. Transit System, Inc. as we anticipated, went out on a directed verdict so we have left the defendant American Ice Company, Inc. and Scott, who was brought in as a co-defendant by the American Ice Company.

We deem it advisable for the court and the jury that Scott be present in court on next Tuesday, November 13, 1962. Therefore, the necessity of the added expense.

I would like to be able to give you the final outcome of this case but as you well know, it is hard to determine what twelve jurors will do with the case. I might add that our opinion is that there will be at least a verdict for Walker and possibly a verdict for Scott. We will have to wait until the jury gives its verdict before the amount is ascertained.

Very truly yours,

E. Willard Hyde
E. Willard Hyde

EWH: lac/Encls

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N. W.
WASHINGTON 4, D. C.

November 14, 1962

Mr. Lloyd Amberson
National Union Fire Insurance Co.
Pittsburgh 13, Penna.

Re: Claim No. 1-C-2787
Policy No. AC750826
Scott and Walker, et al vs. American Ice Company, Inc. and D. C. Transit System, Inc.
D/A: March 4, 1958

Dear Mr. Amberson:

You were alerted that the above case was especially set for trial on November 6, 1962 at 10:00 a.m.

After six days of extensive trial before Judge Pine and fourteen jurors (two of whom were alternates), there was a finding by said jury in favor of Walker for $60,000.00 and as Scott was made a third party defendant with American Ice Company, Inc. and D. C. Transit System, Inc., he is to pay one half of the $60,000.00 in favor of Walker or $30,000.00. Of course, we will have to deduct the costs of what we have advanced Walker compensation and medical-wise and all other expenses that have been created in his case against American Ice Company, Inc. and Scott.

The D. C. Transit System, Inc. went out on a directed verdict by Judge Pine.

I have informed you that we felt confident in the Walker case but had our doubts about the out-come of the Scott case.

At no time did we bring in Scott as a third party defendant. He was brought in by the American Ice Company,

Inc. and as per your letter of October 24, 1962 we defended Scott as the third party defendant being of the belief, and the court concurred, that there was not a conflict of interest.

We are of the opinion and so is the defendant's attorney that there is no error in this case and we concur with the defendant American Ice Company, Inc.'s counsel that the court properly directed a verdict in favor of the D. C. Transit System, Inc. Accordingly, we feel that a motion for a new trial on behalf of Scott against American Ice Company, Inc. in the judgment of contribution rendered against him, or an appeal on his behalf, would be futile in as much as the jury found him liable on the grounds of contributory negligence. Although the interests of National Union, Scott, and Walker were harmonized in the prosecution of this case, the jury has separated these interests in its finding for Walker against Scott. Therefore, we could not represent Scott further either as a plaintiff or third party defendant in a motion for new trial or an appeal. In the event that Scott wishes to appeal as an individual, it will be necessary for him to select other counsel and in the event that the company wishes to prosecute an appeal either as to the subrogation interest as the plaintiff in Scott's case or on his behalf as the third party defendant, it will also be necessary to select other counsel for further representation.

Inasmuch as the time runs within ten days for the filing of a motion for new trial, we request your immediate response and instructions concerning the position you might take in Scott's case.

Very truly yours,

E. WILLARD HYDE
E. Willard Hyde

EWH: lac

NATIONAL UNION INSURANCE COMPANIES
PITTSBURGH 13, PENNSYLVANIA

November 16, 1962

E. Willard Hyde, Esquire
1319 F Street, N. W.
Washington, D. C.

Re: Claim No. 1 C 2787
Scott & Walker et al
v. American Ice Co. et al

Thank you for your letter of November 14 advising us of the results of our subrogation action.

We agree with the thoughts expressed in the next to the last paragraph of your letter re possible conflict of interest at this time and, in this regard, you are hereby formally advised that you are relieved as of now as counsel for National Union in this action. If National Union should need counsel in this action at some later date, the matter will be handled by Douglas Clark, Esquire; 650 Warner Bldg., Washington, D. C.

Naturally we look forward to receiving satisfaction of our lien in the Walker case in due time.

Yours very truly,

C. J. REALE
C. J. Reale
Claim Manager
Eastern Zone

CJR: aa

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N. W.
WASHINGTON 4, D. C.

November 19, 1962

Mr. Cosmos Reale
National Union Fire Insurance Co.
Pittsburgh 13, Penna.

Re: Claim No. 1-C-2787
Scott & Walker et al v. American Ice Company, Inc. et al

Dear Mr. Reale:

I have and thank you for your letter of November 16, 1962.

We will be happy to extend our co-operation to Douglas Clark, Esquire if and when you have made up your mind whether there is anything further you can do in this case.

I have given this case a lot of study on the facts and law embodied and I am of the belief that further action in this case would only be costly.

We have kept you advised as to the facts and law embodied in the action of the plaintiffs and third party defendant, Scott, as we have proceeded and now comes the time wherein we will subtract from Walker's judgment the amount of our subrogation claim.

We have an additional bill from Dr. Braden for his testimony at the trial of Walker for $100.00, which is enclosed. Dr. Yager testified on behalf of Scott but we have not received his bill as yet. I imagine it will be about the same as that of Dr. Braden.

You will kindly give me the exact amount that is to be deducted from Walker's judgment in order that we can

satisfy this amount and, therefore, there will be no discrepancy as to the deduction.

Very truly yours,

E. WILLARD HYDE
E. Willard Hyde

EWH: lac

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N. W.
WASHINGTON 4, D. C.

November 27, 1962

Mr. Cosmos Reale
National Union Fire Insurance Co.
Pittsburgh 13, Penna.

Re: Claim No. 1-C-2787
Policy No. AC 750826
Scott & Walker v. American Ice Company Inc. et al
D/A: March 4, 1958

Dear Mr. Reale:

Since ours of November 14, 1962 and yours of November 16, 1962, there has been filed by the defendant, American Ice Company, Inc., through their attorney, Justin L. Edgerton, a Motion of Defendant (a) For a New Trial or, in the alternative, (b) For a Remittitur on the afternoon of November 26, 1962. A copy of said Motion is enclosed for your edification and files.

We are answering this Motion within the required five (5) days as we are of the belief that Walker has been given a fair sum against the defendant less the monies that have been paid to Walker for his compensation, medicals, and other expenditures. Also it would not be your

wish to upset the verdict of Walker v. American Ice Company, Inc.

You are cognizant of the fact that Scott was made a defendant, whom we no longer represent according to your letter of November 16, 1962. Scott is well versed on his further procedure; that is, since we are not representing him, he would have to get his own counsel as he had been found guilty by the jury of contributory negligence and one half of the verdict would go against Scott which is eventually the National Union Fire Insurance Company of Pittsburgh, Pennsylvania. It may be that you wanted to file a motion on behalf of Scott, the defendant, for a new trial through your attorney, Douglas Clark, Esq., who has not contacted me or shown any appearance in this case whatsoever and the ten (10) days for the filing of a motion for new trial is at an end.

I am also enclosing to you our bill for the defense only of Scott in this case.

Very truly yours,

E. Willard Hyde
E. Willard Hyde

EWH: lac
Encls.

E. WILLARD HYDE
ATTORNEY AT LAW
1319 F STREET, N. W.
WASHINGTON 4, D. C.

November 27, 1962

Re: Harvey P. Walker & Delbert J. Scott et al v.
American Ice Company, Inc. et al
Claim No. 1-C-2787
D/A: March 4, 1958

FEE FOR REPRESENTATION OF DELBERT J. SCOTT,
THIRD PARTY DEFENDANT

Legal research and opposition to motion to bring in third party defendant, Delbert J. Scott	$ 150.00
Court appearance on motion	75.00
Answer of third party defendant	25.00
Pretrial statement for third party defendant	25.00
Court appearance for pretrial on behalf of third party defendant	50.00
Six days trial time on behalf of third party defendant at $150.00 per day	900.00
Total	$1,225.00

Payment received on _____

NATIONAL UNION INSURANCE COMPANIES
PITTSBURGH 13, PENNSYLVANIA

December 7, 1962

E. Willard Hyde, Esq.
1319 F Street, N. W.
Washington 4, D. C.

Re: Claim No. 1-C-2787
Scott & Walker v. American
Ice Company, Inc. et al

Dear Mr. Hyde:

Thank you for your letter of November 27, 1962. We certainly appreciate your concern in our behalf but we assure you that the interests of National Union are being properly protected by Douglas Clark, Esq.

We regret that we cannot honor your bill in the amount of $1,225 for the defense of Scott. As you have been aware, the National Union Fire Insurance Company does not insure Scott or extend any coverage to him in connection with this case and, consequently, we are at a loss to follow the rationale you have employed in your aforementioned letter.

Very truly yours,

C. J. REALE
C. J. Reale
Eastern Zone
Claims Manager

CJR:js

Filed June 15, 1966

Memorandum and Order

This action is before the court on an attachment issued by the American Ice Company, as garnishor, against National Union Fire Insurance Company of Pittsburgh as garnishee. The attachment arose out of the refusal of National Union to pay a judgment in favor of American Ice Company against Delbert J. Scott for $30,000.00 and costs of $43.00. Resolution of the issue presented will require a determination as to whether, on the facts set out below, the garnishee is precluded from asserting a provision of an insurance contract with Scott's employer, W. W. Chambers, which would exclude coverage of Delbert J. Scott. The facts have been stipulated to by the parties.

An automobile accident which occurred on March 4, 1958, gave rise to the original litigation. The accident involved a truck, owned and operated by the American Ice Company, and an ambulance owned by W. W. Chambers Company and operated by Delbert J. Scott in which Harvey P. Walker was riding as an attendant. Both Scott and Walker were employees of Chambers. As a result of the accident both were injured.

Thereafter, two suits were filed. Harvey P. Walker brought suit against the American Ice Company for damages arising from the accident. National Union Fire Insurance Company of Pittsburgh, the liability and workmen's compensation insurer of W. W. Chambers, joined in Walker's suit against American Ice Company for an amount to which they were subrogated by reason of workmen's compensation and medical payments made to Walker as a result of the accident. In the second suit, Delbert J. Scott similarly sought damages from American Ice, and again National Union joined as plaintiff. E. Willard Hyde, Esq., was attorney for the plaintiffs in both cases. During pendency of both cases, Ernest C. Raskauskas entered his

appearance as attorney for the plaintiffs. The two suits were consolidated for pretrial and trial.

On April 16, 1962, in the *Walker* case, American Ice Company moved for leave to file a third-party complaint against Delbert J. Scott seeking contribution on the theory that he was jointly liable with the driver of the American Ice truck for the injuries sustained by Walker. The motion was granted. On September 6, 1962, an answer to the third-party complaint was filed on behalf of the third-party defendant Scott by Messrs. Hyde and Raskauskas, as his attorneys. On September 19, 1962, a supplemental pretrial hearing was held concerning the issues raised by the third-party complaint and answer, in which Mr. Raskauskas participated as attorney for the third-party defendant Scott. The consolidated cases were called for trial in this court before Judge Pine on November 6, 1962, and on November 14 trial was concluded. Both Mr. Hyde and Mr. Raskauskas actively defended Scott as third-party defendant in the trial, as well as trying both cases for the plaintiffs. The verdict of the jury in the *Walker* case was for the plaintiffs for $60,000.00 and on the third-party complaint for the third-party plaintiff, American Ice Company, for contribution against third-party defendant Scott. In the *Scott* case, the verdict of the jury was for the defendant American Ice Company. Post-trial motion in the *Walker* case was made and denied, and on January 31, 1963, a praecipe was filed entering the judgment for plaintiffs Walker and National Union Fire Insurance Company against American Ice Company as fully paid and satisfied.

On February 8, 1963, a judgment was entered by Judge Pine on the verdict in favor of third-party plaintiff American Ice Company against third-party defendant Delbert J. Scott for $30,000.00 and costs of $43.00.

On the date of the accident, March 4, 1958, the Cadillac ambulance here involved was owned by W. W. Chambers Company and insured for public liability by Policy No.

AC750826, issued by National Union Fire Insurance Company of Pittsburgh on December 15, 1957. A specimen copy of this policy is stipulated. The "Insuring Agreements" of this policy contain the following provision:

> "III. Definition of Insured: * * * The insurance with respect to any person or organization other than the named insured or such spouse does not apply:
>
> * * *
>
> "(2) 'to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.'"

National Union Fire Insurance Company refused to pay the judgment against Scott, and on March 8, 1963, the instant attachment was issued by third-party plaintiff American Ice Company against National Union Fire Insurance Company of Pittsburgh as garnishee. The garnishee thereafter made the following answers to the interrogatories on this attachment (the court has omitted a number of the interrogatories):

> " * * *
>
> "3rd. Had you at the time of the accident of March 4, 1958 an automobile liability policy issued to W. W. Chambers Co. covering the operation of the Cadillac ambulance involved in such accident? If so, state the number, date issued and policy limits.
>
> "Answer: Yes. Policy No. AC 750826 issued December 15, 1957. Our attorney advises us that we do not have to disclose policy limits.
>
> "4th. Did the policy referred to in Question 3 extend insurance coverage to employees of W. W. Chambers Co. operating automobiles belonging to said as-

sured and operated in the course of its business and with its consent?

"Answer: Yes, but said policy does not cover an employee's negligence causing injury to fellow employee.

"5th. Pursuant to the provisions of the policy referred to in Questions 3 and 4, did you extend to third-party defendant Delbert J. Scott a defense to the claims asserted by the third-party complaint herein?

"Answer: We did not authorize a defense for Scott. We permitted counsel to defend Scott upon his representation that there was no conflict of interest involved.

"6th. If the answer to Interrogatory No. 5 is in the affirmative, state whether such defense was extended under any form of reservation of rights, non-waiver agreement, or any other such disclaimer of liability.

"Answer: It was not, since we did not cover Scott for his negligence causing injury to a fellow employee.

* * *

"8th. Did you engage or retain counsel to represent third-party defendant Delbert J. Scott in the defense of said third-party complaint? If so, whom did you engage and when?

"Answer: We did not engage counsel. We permitted E. Willard Hyde, Esquire, to defend Scott upon his representation that there was no conflict of interest involved. Mr. Hyde was so advised in October of 1962.

* * * "

On April 11, 1963, third-party plaintiff American Ice Company filed a traverse to these answers.

At a hearing before this court on March 23, 1966, Aetna Casualty and Surety Company was made a party to these

attachment proceedings by praecipe filed on that date. In fact, Aetna Casualty and Surety Company, the liability insurance carrier of American Ice Company, is the only party who has any interest in the attachment proceedings before this court.

Together with the above agreed facts (which the court has taken the liberty of abbreviating) counsel submitted copies of the correspondence between National Union Fire Insurance Company of Pittsburgh and E. Willard Hyde, Esq. Counsel for the garnishee argues that the contents of this correspondence are privileged as communications between an attorney and his client. The court must reject this contention. In so far as the letters are relevant, they involve inquiries on the part of Mr. Hyde as to whether he could represent Scott in Scott's capacity as a third-party defendant, in addition to his representation of Scott as plaintiff. The only legal expertise contained therein is the statement that there would be no conflict of interest in representing Scott in this dual capacity, and that therefore retention of further counsel by National Union would be unnecessary. National Union's replies were not made for the purpose of obtaining a more exact and complete knowledge of its rights and duties, but were rather in the form of a permission or instruction, the purport of which the court will discuss later in this opinion. By their very nature, these instructions, when carried out, would become public. It has been held that the rule as to privileged communications does not exclude evidence as to the instructions or authority given by the client to his attorney to be acted upon by the latter. *Willard C. Beach Air Brush Co.* v. *General Motors Corp.*, 118 F. Supp. 242 (D. N.J., 1953), aff'd 214 F. 2d 644 (3rd Cir., 1954); 97 C.J.S. *Witnesses*, § 287 (1957). See *Catalog Ass'n* v. *Eberly's Sons, Inc.*, 60 App. D.C. 216, 50 F. 2d 981 (1931). Upon this basis the court will hold the letters to be admissible.

Analysis of counsel's Agreed Statement of Facts, the pretrial stipulations, the interrogatories, and the sub-

mitted correspondence between National Union and Mr. Hyde lead the court to conclude that, in defending Scott in his capacity as third-party defendant, Hyde and his associate counsel Raskauskas were acting in accordance with the directions of National Union, as that Company's attorneys. It follows, therefore, that National Union, through these attorneys, rendered Scott a defense in his capacity as third-party defendant. Counsel for the garnishee National Union contends that Hyde never asked for authority to defend Scott in his (Hyde's) capacity as attorney for National Union, but rather merely sought to defend Scott as Scott's retained counsel. The letters belie this contention. The first of the submitted letters is from Mr. Hyde to National Union, dated October 1, 1962, and addressed to Mr. Cosmos Reale. Mr. Hyde refers to his unanswered letter of May 9, 1962, to National Union, in which he informed National Union that Scott had been brought into the case as a third-party defendant. The letter contains the following statements:

> "* * * *in the event there is a finding in this case for the plaintiffs Scott as the third party defendant should share part of the losses, *which would ordinarily entitle him to an attorney furnished by the assured's insurance carrier,* * * *.
>
> "After giving this case much thought, we are of the opinion that there is no conflict of interest in this case as Walker's and Scott's testimony will be the same and, therefore, there is no need to obtain further counsel as we can represent Scott as the plaintiff as well as the defendant when the facts are analogous. * * * *."

The court believes a fair reading of the above indicates that Mr. Hyde was unaware of the clause which would preclude coverage of Scott, that he believed Scott in his capacity as third-party defendant was entitled to an attorney furnished by W. W. Chambers' insurance carrier, and

that Hyde felt he could serve in this capacity as well as that of attorney for the plaintiffs. This reading is confirmed by Mr. Hyde's letter of October 12, in which he again pressed for an answer to his still unanswered query concerning the defense of Scott. In the October 12th letter Hyde states:

> "* * * We do not want to be placed in a position where Scott would have to share a judgment which would be over and against the carrier for W. W. Chambers Company without the consent of the company that we represent Scott."

This letter also went unanswered, and Hyde wrote again on October 17th requesting a reply. On October 24, 1962, National Union replied to Hyde in the person of Mr. Lloyd G. Amberson. Mr. Amberson stated he had discussed the matter with the Eastern Zone Claim Manager, Mr. Cosmos Reale, and that: "It has been agreed you may render a defense to Scott in the present pending matter of Scott and Walker v. American Ice Company and D. C. Transit System." This statement was immediately followed by the statement, in a new paragraph: "This Company afforded liability coverage to the W. W. Chambers Company, Inc., under Policy No. AC 750826." In the following paragraph appears the statement: "* * * any additional fee incurred as a result of defending under the liability exposure should be submitted to the Company separate from the compensation arrangements." Following this letter, which the court believes is determinative when read in the context of Mr. Hyde's previous letters, Hyde wrote three times to Mr. Amberson, all for the purpose of keeping the Company informed as to the progress of the suit and as to the monies which had been expended. On November 14, 1962, Mr. Hyde wrote Mr. Amberson to inform him of the results of the suit. The jury had found for the defendant American Ice Company in Scott's case, and had found in favor of Walker for $60,000.00, against American Ice,

and against Scott as third-party defendant, in Walker's action against American Ice. Scott would therefore be required to pay one-half of the $60,000.00 judgment—$30,000.00. Later in the letter Mr. Hyde state: "* * * as per your letter of October 24, 1962 we defended Scott as the third party defendant being of the belief, and the court concurred, that there was not a conflict of interest." Hyde further stated therein that:

> "* * * Although the interests of National Union, Scott, and Walker were harmonized in the prosecution of this case, the jury has separated these interests in its finding for Walker against Scott. Therefore, we could not represent Scott further either as a plaintiff or third party defendant in a motion for new trial or an appeal. In the event that Scott wishes to appeal as an individual, it will be necessary for him to select other counsel and in the event that the company wishes to prosecute an appeal either as to the subrogation interest as the plaintiff in Scott's case or on his behalf as the third party defendant, it will also be necessary to select other counsel for further representation.
>
> * * * "

Mr. Hyde received in reply to this a letter dated November 16, 1962, from Mr. C. J. Reale, which expressed agreement with Mr. Hyde's observations on conflict of interest and relieved Mr. Hyde as counsel for National Union. Mr. Hyde acknowledged this letter on November 19, 1962. On November 27, 1962, Mr. Hyde again wrote National Union to inform it of the post-trial motions made on behalf of the defendant, American Ice. The letter goes on to discuss Scott's position:

> "* * * since we are not representing him, he would have to get his own counsel as he had been found guilty by the jury of contributory negligence and one half of the verdict would go against Scott which is

> eventually The National Union Fire Insurance Company of Pittsburgh, Pennsylvania. * * *
>
> "I am also enclosing to you our bill for the defense only of Scott in this case."

Attached to the letter was a bill for $1,225.00 bearing the heading "Fee for Representation of Delbert J. Scott, Third Party Defendant". In reply to this came a letter from C. J. Reale dated December 7, 1962, which, after thanking Mr. Hyde for his letter and his interest, stated the following:

> "We regret that we cannot honor your bill in the amount of $1,225 for the defense of Scott. As you have been aware, the National Union Fire Insurance Company does not insure Scott or extend any coverage to him in connection with this case and, consequently, we are at a loss to follow the rationale you have employed in your aforementioned letter."

The court believes the purport of the above letter is in total variance with Mr. Amberson's letter of October 24th, which, read against the background of Mr. Hyde's letters, amounts to an ambiguous direction to defend Scott. Certainly if the purpose of the October 24th letter was merely to approve of Mr. Hyde's taking Scott on as his own client, there would have been no need to mention the insurance policy held by W. W. Chambers. Mr. Hyde's subsequent letters and the bill he submitted all indicate he believed he was defending Scott as attorney for National Union. Concluding, then, that Hyde was acting as attorney for National Union when he defended Scott in Scott's capacity as third-party defendant, the issue now becomes whether, by rendering this defense, National Union has precluded itself from asserting the exclusionary clause in the policy which clearly puts Scott's injuries to Walker, his fellow employee, outside the coverage of the policy.

The doctrines of law which the court must apply in resolving the issue are burdened with labels which are often misleading. The cases variously use the terms "waiver", "estoppel", or both. The particular precedent which controls in this case, as it has developed, properly involves neither "waiver" nor "estoppel" as those terms are used in other fields of the law. With this in mind, the most fruitful approach is to ascertain what factors the cases have required to be present before they have invoked what has variously been called "waiver" or "estoppel" to preclude the insurer involved from asserting the full provisions of the insurance contract, and then examine the instant case to see if those factors are present.

There is a well established doctrine that waiver and/or estoppel cannot be used to extend the coverage or the scope of the policy:

> "* * * The rule is that while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage or restrictions on the coverage cannot be extended by the doctrine of waiver or estoppel. * * *
>
> "* * * The doctrine of waiver cannot be invoked to create a primary liability * * *. * * *" *C. E. Carnes & Co.* v. *Employers' Liability Assur. Corp.*, 101 F. 2d 739, 742 (5th Cir., 1939).

See also *United Pac. Ins. Co.* v. *Northwestern Nat. Ins. Co.*, 185 F. 2d 443 (10th Cir., 1950); *Bourne* v. *Seal*, 53 Ill. App. 2d 155, 203 N.E. 2d 12 (App. Ct., 1964); 113 A.L.R. 857, 888 (1933). To this rule there is an equally well established exception, which is stated in its most accepted form in *American Jurisprudence:*

> "* * * if a liability insurer, with knowledge of a ground of forfeiture or noncoverage under the policy, assumes and conducts the defense of an action brought against the insured, without disclaiming lia-

> bility and giving notice of its reservation of rights, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or non-coverage. * * *'' 29A Am. Jur., *Insurance* § 1465 (1960).

See *Insurance Co. of No. Am.* v. *Atlantic Nat'l Ins. Co.*, 329 F. 2d 769, 775 (4th Cir., 1964).

This rule finds its origin in a number of cases decided just after the turn of the century. Thus, in *Employers' Liab. Assur. Corp.* v. *Chicago & B. M. C. & C. Co.*, 141 Fed. 962 (7th Cir., 1905), a case which involved a contract that indemnified an employer-insured against loss from statutory or common law negligence, but excepted therefrom injuries resulting from the failure of the insured to observe any statute affecting the safety of persons, the court held that where the insurer, with full knowledge of the facts, conducted the defense in the name of the insured, such action constituted a contemporaneous construction of the policy, which estopped the insured from thereafter denying its liability on the ground that the case was not in the terms of the policy. This case was closely followed in *Empire State Sur. Co.* v. *Pacific Nat. Lumber Co.*, 200 Fed. 224 (9th Cir., 1912). The same rule was invoked in *Fairbanks Canning Co.* v. *London Guar. & Acc. Co.*, 154 Mo. A, 327, 133 S.W. 664 (Kansas City Ct. of App., 1911). The policy in that case contained a non-coverage provision for children employed by the insured who were under the legal age of employment. The court held that the assumption of the defense of the insured precluded the insurer from later showing facts which would put the event outside of the coverage of the policy where the insured had given to the insurer all information they had on the subject and investigation of the matter would have revealed the true posture of the case. Significantly, the court further held that the loss of a

right to control and manage one's own case was in itself prejudicial:

> "* * * Who can say what plaintiff might have done in its own behalf had it not been ousted from control and direction of the defense * * *? If a man is to bear the burden of the result of a defense to an action, it is his privilege to have his own personality appear in its course. He is entitled to have the results measured up to him, and not to some other. * * *" 133 S.W. at 667.

The holdings of these early cases have been followed without significant divergence. In the case of *Pendleton* v. *Pan American Fire and Cas. Co.*, 317 F. 2d 96 (10th Cir., 1963), an explosion caused the loss. After making a thorough investigation of the explosion, and with full knowledge of the contents of its policy and of claims against its insured, the insurer assumed complete control of the insured's defense in the suits brought against him. It at no time notified him of any reservation or rights. The court held that by such conduct the insured was induced to relinquish control of his defense and that the insurer was estopped to deny its liability under the policy. The court observed that, by the weight of authority, it is not necessary for the insured to show prejudice in such a situation because he is presumed to have been prejudiced by virtue of the insurer's assumption of the defense, citing *Schmidt* v. *Nat'l Auto & Cas. Ins. Co.*, 207 F. 2d 301 (8th Cir., 1953), 38 A.L.R. 2d 1142. The excellent opinion in *Ebert* v. *Balter*, 83 N.J. Super. 545, 200 A. 2d 532 (Union Cty. Ct., Law Div., 1964). further illustrates the present posture of the law. That was a dramatic case of non-coverage. The insured event occurred one day before the insurance contract came into effect. In spite of the fact that the insurer obtained a very generally worded waiver of rights, the court held that the company, which had received conflicting information as to the day the accident

occurred, was negligent in failing to ascertain the correct date, and that, therefore, by investigating and assuming defense of the claim against the insured for thirty-one months before it withdrew, the insurer became liable to the insured for the amount of the judgment entered against the insured and for the insured's subsequent expenses in defending against the claim. *Salerno* v. *The Western Cas. & Sur. Co.*, 336 F. 2d 14 (8th Cir., 1964), again involved a noncoverage situation. Ten months after the insurer had assumed the defense of the insured, it discovered that the injury-producing activity was of such a character as to put it outside the coverage of the policy. The Eighth Circuit, applying Missouri law, found the insurer was estopped from asserting the noncoverage, putting considerable emphasis on the fact that, within just a few days after the event took place, the insurer had equal knowledge and means of knowing the true nature of the risk-producing activity.

National Union defended Scott without any reservation of rights. It knew of Scott's position as a fellow employee of the injured plaintiff Walker. It was charged with knowledge of the contents of its policy. *General Tire Co.* v. *Standard Acc. Ins. Co.*, 65 F. 2d 237, 240 (8th Cir., 1933). The fact that there has been no showing that Scott was prejudiced by the defense is immaterial, as such prejudice is presumed as a matter of law by the great weight of authority. Thus, while the doctrinal requirements for the working of either a waiver or an estoppel may not be fulfilled, the requirements for the working of a preclusion to assert the policy terms, as those requirements are set out by the great weight of authority, are unquestionably present. The court therefore holds that National Union is precluded from asserting the exclusionary clause here involved. It follows that the garnishor, Aetna Casualty and Surety Company, is entitled to a judgment against National Union Fire Insurance Company of

Pittsburgh in the amount of Thirty Thousand and Forty-three Dollars ($30,043.00).

This memorandum shall constitute findings of fact and conclusions of law.

It is, this 15th day of June, 1966.

ORDERED that the Aetna Casualty and Surety Company have judgment against the National Union Fire Insurance Company of Pittsburgh in the amount of $30,043.00.

R. B. KEECH
Judge

Filed June 27, 1966

Notice of Appeal

Notice is hereby given this 27th day of June, 1966, that National Union Fire Insurance Company of Pittsburgh, garnishee hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of June, 1966 in favor of Aetna Casualty & Surety Company against said National Union Fire Insurance Company of Pittsburgh.

DOUGLAS A. CLARK
Attorney for National Union Fire Insurance Company of Pittsburgh

JUSTIN L. EDGERTON
Pledger, Edgerton & Mahoney
925 Washington Building
Washington, D. C. 20005

BRIEF OF APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,381

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH,
a corporation,

Appellant,

v.

AETNA CASUALTY & SURETY COMPANY,
a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES E. PLEDGER, JR.
JUSTIN L. EDGERTON
JOHN F. MAHONEY, JR.
925 Washington Building
Washington, D. C. 20005

Attorneys for Appellee

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BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE

As the issues raised by the traverse proceedings were submitted to the District Court under an "Agreed Statement of Facts", counsel for appellee does not deem it appropriate to burden this Court with any attempted summary of the facts which are not disputed and are set forth in full in the Joint Appendix (J.A. 9-36). Further, Judge Keech in his Memorandum Opinion (J.A. 37), which constituted the findings of fact of

the District Court, has summarized the facts which he deemed essential to support his conclusions of law based on this record.

However, it should be pointed out that the statement of the case contained in appellant's brief contains argumentative matter which goes beyond the "Agreed Statement". In this connection, it should be noted that the original record from the District Court shows that correspondence between E. Willard Hyde, Esquire, and National Union Fire Insurance Company of Pittsburgh was first produced by Mr. Hyde, pursuant to a subpoena for the taking of his deposition, and that the originals of this correspondence were produced at the time of trial in the Court below pursuant to subpoenas issued to both Mr. Hyde and to the Manager of the local office of National Union.

For the sake of brevity, the parties will hereafter be referred to in this brief as follows: National Union Fire Insurance Company of Pittsburgh as "National Union"; Delbert J. Scott, the third-party defendant below, as "Scott"; and Aetna Casualty & Surety Company, the real party in interest to the traverse proceedings, as "Aetna".

SUMMARY OF ARGUMENT

The District Court was clearly right in finding as a fact from the "Agreed Statement of Facts", including the correspondence attached thereto, that National Union, with full knowledge of the exclusion clause in its liability insurance policy, voluntarily assumed the defense of the third-party complaint filed by American Ice Company against Scott. No other finding would have been reasonable on this record.

The District Court was correct in admitting into evidence the file of correspondence between E. Willard Hyde, Esquire, and National Union relative to the former's authorization to represent the defendant Scott under the third-party complaint for the reason that the rule as to priv-

ileged communications does not exclude evidence as to the instructions or authority given by the client to his attorney to be acted upon by the latter.

By reason of the voluntary assumption of the defense of Scott as an additional insured under its liability policy, National Union waived the exclusionary provision of its policy, and by its conduct it is now precluded from asserting that its policy did not extend coverage to Scott.

As attaching judgment credit of Scott, both American Ice and Aetna, its subrogee, stand in the shoes of Scott with respect to his rights under the policy against National Union.

ARGUMENT

I

Under the "Agreed Statement of Facts" There Can Be No Question That National Union, With Knowledge of Its Policy Coverage, Voluntarily Assumed Scott's Defense to the Third-Party Complaint.

The factual background of the litigation in the District Court is fully set forth in the "Agreed Statement of Facts" (J.A. 9-36) and summarized by Judge Keech in his Memorandum Opinion (J.A. 37). Without indulging in repetition of these facts, it is necessary, however, to emphasize certain of them relating to the filing of the third party complaint by American Ice Company against Scott.

The third-party complaint was filed with leave of the Court below. On September 6, 1962, an answer to the third-party complaint was filed on behalf of the third-party defendant Scott by Messrs. Hyde and Raskauskas, as his attorneys. On September 19, 1962, a supplemental pretrial hearing was held concerning the issues raised by the third-party complaint and answer, in which Mr. Raskauskas participated as attorney for the third-party defendant Scott. The two actions below, which

had been consolidated, which were called for trial before Judge Pine in the District Court on November 6, 1962, and on November 14 the trial was concluded. Mr. Hyde and Mr. Raskauskas actively defended Scott as third-party defendant in the trial, as well as trying both cases for the plaintiffs.

Judge Keech, based on the facts developed in the "Agreed Statement of Facts" and in the correspondence between Mr. Hyde, on the one hand, and National Union, on the other, which was attached to the "Agreed Statement", found as a fact that National Union had voluntarily authorized Mr. Hyde to defend the third-party complaint for Scott.

Although the correspondence referred to speaks for itself, certain of the letters are of more significance than others on this issue, as indicated by Judge Keech in his Memorandum Opinion.

The first letter from Mr. Hyde to National Union was dated October 1, 1962 (J.A. 16). In this letter Mr. Hyde refers to his unanswered letter of May 9, 1962 to National Union, in which he informed the latter that Scott had been brought into the matter as a third-party defendant and, among other things, Mr. Hyde stated:

> "* * * in the event there is a finding in this case for the plaintiffs Scott as the third party defendant should share part of the losses, *which would ordinarily entitle him to an attorney furnished by the assured's insurance carrier*, * * *.
>
> "After giving this case much thought, we are of the opinion that there is no conflict of interest in this case as Walker's and Scott's testimony will be the same and, therefore, there is no need to obtain further counsel as we can represent Scott as the plaintiff as well as the defendant when the facts are analogous. * * *" [Emphasis supplied]

Having received no reply to this letter, Mr. Hyde again wrote National Union under date of October 12 (J.A. 18), requesting authority to repre-

sent Scott as plaintiff as well as defendant, sanctioning the procedure which he had adopted to that date and further stating:

> "* * * We do not want to be placed in a position where Scott would have to share a judgment which would be over and against the carrier for W. W. Chambers Company without the consent of the company that we represent Scott."

Still having no answer to either of his previous letters, Mr. Hyde again wrote under date of October 17 (J.A. 19-20), pointing out that the case was set for trial on November 6, and that he must have the authorization previously requested. Each of the three foregoing letters was addressed to Mr. Cosmos Reale, who was designated as Claim Manager, Eastern Zone of National Union. Finally, under date of October 24, Mr. Hyde received a letter from National Union, signed by Mr. Lloyd G. Amberson, "Workmen's Compensation Supervisor", which referred to the previous correspondence and specifically Mr. Hyde's letter of October 12, in which he advised Mr. Hyde that, after discussing the matter with Mr. Reale,

> "It has been agreed you may render a defense to Scott in the present pending matter of Scott and Walker v. American Ice Company and D. C. Transit System.
>
> "This Company afforded liability coverage to the W. W. Chambers Company, Inc. under Policy No. AC 750826.
>
> "We request any correspondence regarding the liability portion be directed to Home Office under above mentioned liability policy number and any additional fee incurred as a result of defending under the liability exposure should be submitted to the Company separate from the compensation arrangements."

The remainder of the letter contained the customary statements which would be written regarding the assumption of a "liability" defense and

advising that the Company was "creating a liability file", and requesting Mr. Hyde to complete the customary suit report required in all liability cases.

Judge Keech found that this letter was determinative of the issue as to whether Hyde had been authorized to defend Scott and buttresses his findings by reference to later correspondence in which National Union adopts an inconsistent position only after the verdict had been entered against Scott on the third-party complaint. See Judge Keech's Memorandum Opinion (J.A. 42-45). The finding is clearly correct and is supported by the only evidence available to the Court below. The only possible inference that can be drawn is that National Union voluntarily assumed the defense of Scott with its eyes wide open and with a complete knowledge of the situation, including Mr. Hyde's appraisal that the defense of Scott might be fraught with difficulties under the facts (see Mr. Hyde's letter of October 12, J.A. 18-19). There can be no question that National Union and any of its authorized representatives, including Mr. Amberson, were chargeable as a matter of law with the provisions of its own policy. See *General Tire Co. v. Standard Acc. Ins. Co.* (C.A. 8, 1933), 65 F.2d 237, 240.

Furthermore, the record is clear that this assumption of the defense by National Union was made without any form of reservation of rights, non-waiver agreement or other disclaimer of liability by National Union under its policy. (See its Answer to Interrogatory 6 in the Interrogatories on the Attachment, J.A. 13).

Appellant now contends, as it contended before Judge Keech, that this correspondence was improperly received in evidence on the ground that the letters were privileged communications between attorney and client. Judge Keech overruled this objection and admitted the letters into evidence and his reasons are fully stated in his Memorandum Opinion (J.A. 41). The ruling is clearly correct in the light of the authorities relied upon by Judge Keech, namely: *Willard C. Beach Air*

Brush Co. v. General Motors Corp., 118 F. Supp. 242 (D. N.J. 1953), aff'd 214 F.2d 644 (C.A. 3, 1954), and *Catalog Ass'n v. Eberly's Sons, Inc.*, 60 App. D.C. 216, 50 F.2d 981 (1931). See, generally, 97 C.J.S., Witnesses, § 287 (1957).

II

By Reason of Its Voluntary Act, National Union Is Now Precluded From Asserting That Its Policy Does Not Extend Coverage to Scott.

Appellee completely accepts and relies upon the well reasoned opinion of Judge Keech below in his treatment and decision of this question of law. (See J.A. 37, 46-49.)

Appellee also relies on the authorities cited and discussed by Judge Keech, namely: 29A *Am. Jur., Insurance,* § 1465 (1960); *Employers' Liab. Assur. Corp. v. Chicago & B.M.C.&C.Co.*, 141 Fed. 962 (C.A. 7, 1905); *Empire State Sur. Co. v. Pacific Nat. Lumber Co.*, 200 Fed. 224 (C.A. 9, 1912); *Fairbanks Canning Co. v. London Guar. & Acc. Co.*, 154 Mo. App. 327, 133 S.E. 664 (Kans. City Ct. of App. 1911); *Pendleton v. Pan American Fire and Cas. Co.*, 317 F.2d 96 (C.A. 10, 1963); *Schmidt v. Nat'l Auto. & Cas. Ins. Co.*, 207 F.2d 301 (C.A. 8, 1953), 38 A.L.R.2d 1142; *Ebert v. Balter*, 83 N.J. Supp. 545, 200 A.2d 532 (Union Cty. Ct., Law Div., 1964); *Salerno v. The Western Cas. & Sur. Co.*, 336 F.2d 14 (C.A. 8, 1964).

Without in any way conceding that Judge Keech's opinion needs to be bolstered by the citation of additional authorities, it is, nevertheless, submitted that the following are completely applicable:

Nationwide Mutual Insurance Co. v. Thomas, 1962, 113 U.S. App. D.C. 160, 306 F.2d 767, in which this Court affirmed *per curiam* on the opinion of Judge Youngdahl below, *sub nom. Thomas v. Otis*, 1961, 199 F. Supp. 1.

In *Pendleton v. Pan American Fire and Cas. Co., supra,* the opinion of Circuit Judge Hill contains the following significant statement:

> "At the outset, we think this case is controlled by the long established rule that a liability insurance carrier, which assumes and conducts the defense of an action brought against its insured with knowledge of a ground of forfeiture or noncoverage under the policy, and without disclaiming liability or giving notice of a reservation of its right to deny coverage, is thereafter precluded in an action upon the policy from setting up the ground of forfeiture or noncoverage as a defense. In other words, the insurer's unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert the defense of noncoverage." [Cases cited.]

Another good statement of the rule appears in the opinion of Judge Soper in *Claverie v. American Casualty Co. of Reading, Pa.* (C.A. 4, 1935), 76 F.2d 570 at 572:

> "It is quite generally held that a liability insurer is precluded, in an action on a policy, from setting up the defense of noncoverage, when it assumes and conducts the defense of an action against the insured, with knowledge of facts taking the accident or injury outside the coverage of the policy, and without disputing its liability and giving notice to the insured of a reservation of its rights." [Citing numerous cases.]

Judge Keech is further clearly correct in ruling:

> "* * * The fact that there has been no showing that Scott was prejudiced by the defense is immaterial, as such prejudice is presumed as a matter of law by the great weight of authority."

In support of this statement, as illustrative of the great weight of authority to which Judge Keech refers, see *Pendleton v. Pan American Fire and Cas. Co., supra* [p. 99]:

> "* * * Indeed, by the weight of authority, it is not necessary for the insured to show prejudice in such a situation because he is presumed to have been prejudiced by virtue of the insurer's assumption of the defense. Schmidt v. National Auto. & Cas. Ins. Co., supra; General Tire Co. of Minneapolis v. Standard Acc. Ins. Co., supra; 45 C.J.S. Insurance § 714, p. 689; 29A Am. Jr., Insurance, § 1466, p. 579."

And from the opinion above cited by the Tenth Circuit, i.e., *Schmidt v. National Auto. & Cas. Ins. Co., supra:*

> "* * * Notwithstanding the fact that this offer was rejected the insurance company took over the defense of the state court action and filed answer on behalf of the defendants therein. This it had a right to do, not by reason of any request or consent of the defendants but by reason of the provision in the policy making it a duty of the insurance company so to do. In so doing the insurance company deprived the defendants in that action of their right to conduct their own defense and thus estopped itself to deny that the policy was then in effect. * * *"

A strong statement of this rule in a leading state court decision is in *Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp.*, Ct. of App. Mo., 1916, 190 S.W. 382, 385, as follows:

> "Where, as in the case at bar, the testimony tends to prove that the insurer recognized an accident as covered by its policy and proceeded to act thereunder according to its terms, the insured is presumed to have been prejudiced by such conduct, and this is not a rebuttable presumption."

Prejudice is not a factor in this jurisdiction in determining whether a condition in a policy is to be enforced or waived. See, for instance, *Waters v. American Automobile Insurance Co.*, decided June 14, 1966, ___ U.S. App. D.C. ___, 363 F.2d 684, which dealt with the "timely notice" requirement of a claim in a policy. But could it be reasonably

asserted that a defendant who has an unsatisfied judgment on record against him by virtue of the position taken by his insurance carrier is not prejudiced thereby?

III

American Ice Company, and Its Subrogee, Aetna, as Attaching Judgment Creditor of Scott, Stand in His Shoes With Respect to His Rights Under the Policy Against National Union.

The acceptance of this proposition is implicit in Judge Keech's opinion in awarding judgment to Aetna, based on the rights which had inured to Scott against National Union under its policy.

That Aetna as the attaching judgment creditor of Scott stands precisely in the latter's shoes with respect to both the strength and the debilities of his claim against National Union cannot be seriously questioned.

In the opinion of Judge Youngdahl in *Thomas v. Otis, supra,* where exactly the same question was involved with respect to the rights of the attaching judgment creditor, the following appears:

> "Plaintiffs may only recover from Nationwide, the garnishee, if Otis can recover from Nationwide, as they—the plaintiffs—stand in the shoes of the policyholder and enjoy no better rights than he does. Rushing v. Commercial Cas. Ins. Co., 251 N.Y. 302, 167 N.E. 450 (1929). * * *"

In the *Rushing* case, which Judge Youngdahl cites, the holding is equally clear that the attaching creditor "stands in the shoes of the assured" and "must abide by his case when suing on the policy."

For our purposes, therefore, it is submitted that whatever rights Scott has against National Union, the same rights inure to the benefit of both American Ice Company and Aetna.

Appellant's argument on this point is difficult to follow. Aetna is characterized as "a stranger to the transaction" between Scott and National Union. That it is no "stranger" has been demonstrated.

Appellant then makes the extraordinary concession that

> "* * * it might be a different situation were Scott attempting to force National Union Fire Insurance Company of Pittsburgh to pay the judgment which was rendered against him; * * *."

This is a total misconception of Aetna's situation in this litigation. Its rights are exactly those of Scott—it is enforcing Scott's right to have the judgment against him paid by National Union. The concession of appellant is wholly relevant to this appeal and appears to dispose of the questions presented.

CONCLUSION

As National Union deliberately chose to ignore the defense available to it under the exclusion clause in question, and with full knowledge of the situation assumed the defense of Scott and allowed the case to proceed to verdict and judgment without at any time reserving its rights under the policy or making any disclaimer of liability, then it has waived the exclusion to the same complete effect as if the language of the exclusion had been physically deleted from the policy, and by its conduct in assuming the defense to Scott's prejudice it is now precluded from asserting that Scott was neither entitled to a defense nor to have the

judgment against him satisfied from the proceeds of the policy. Judge Keech was clearly right and the judgment of the District Court should be affirmed.

Respectfully submitted,

CHARLES E. PLEDGER, JR.
JUSTIN L. EDGERTON
JOHN F. MAHONEY, JR.

Attorneys for Appellee